

PATRICIA ACOSTA, et al.,
8555 West Russell Road, Unit 2015
Las Vegas, NV 89113-1812,

Plaintiffs,

V.

INTELSAT GLOBAL SERVICE CORP.
et al.,

Defendants.

CIVIL ACTION NO.: 1:04CV01618

Judge James Robertson

**PLAINTIFF’S SURREPLY MEMORANDUM OF POINTS AND
AUTHORITIES IN OPPOSITION TO DEFENDANTS’ MOTION TO DISMISS**

Plaintiffs, by their counsel, respectfully submits this surreply memorandum of points and authorities in opposition to Defendants' motion to dismiss the Complaint in this action for failure to state a claim pursuant to Rule 12(b)(6) and Rule 9(b) of the Federal Rules of Civil Procedure.

INTRODUCTION

Plaintiffs would respectfully submit that the provision in section 2.03 of the Transfer Agreement, wherein Defendant Intelsat assumed the liability for the retirees' and their surviving spouses and dependents' vested health benefits, defeats the arguments raised in Defendant's reply memorandum. Moreover, the Court still does not have the complete transfer Agreement, which in and of itself thus become a factual issue, precluding the granting of a motion to dismiss.

Plaintiffs must respectfully disagree with the Defendants claim that the Complaint cited to the Transfer Agreement in paragraphs 36 and 38 of the Complaint. Defendant's Reply Memorandum at 2n.2. In point of fact, those paragraph do not cite to any particular contract, and merely quote the Board Resolution. Likewise, the Defendants allege their Summary Plan

Description was timely distributed. Defendant's Reply Memorandum at 3n.3. Again, that is a fact not alleged in the Complaint and thus not before this Court, and the Defendants' claim merely reinforces the fact there is a factual dispute which precludes a motion to dismiss. Plaintiffs will prove the Summary Plan Description was not produced to retirees until October, 2001, 6 months after privatization.

On page 6 of the Defendants' Reply Memorandum, the Defendants cite several cases for the proposition the treaty organizational immunity is more than procedural. However, all those cases hold exactly the opposite – saying the immunity is procedural and prevents even a trial. Indeed, the cases refer to the immunity as being a “defense to liability.” (*Id.*) Thus, the cases recognize the very argument the Plaintiffs make - that the immunity does not extinguish the liability, but merely gives a procedural defense. Thus, the cases are of no help to Defendant Intelsat, since Defendant Intelsat explicitly assumed the liability in the Transfer Agreement, while not having the benefit of the immunity. Indeed, it would make no sense for Defendant Intelsat to assume a liability if the parties intended the immunity to apply. The assumption of liability would then be an empty act if the immunity applied, and contracts are never read such that a provision becomes meaningless.

Defendants also try to argue that General Electric Capital Corp. v. Grossman, 991 F.2d 1376 (8th Cir. 1993) and Gould Inc. v. Pechiney Ugine Kuhlmann, 853 F.2d 445, 451 (6th Cir. 1988) hold that privatized corporations retain the immunities for pre-privatization acts. Again, however, there is that nasty problem of the Board Resolution and the Transfer Agreement in the case herein, neither of which were present in General Electric and Gould. In General Electric and Gould, the privatized successor entities did not promise to accept responsibility for the predecessor's acts. Defendant Intelsat herein cannot claim an immunity, when pre-privatization

Intelsat promised in its Board Resolution that post-privatization Intelsat would provide the vested retiree benefits under ERISA, and, moreover, Defendant post-privatization Intelsat in the Transfer Agreement accepted responsibility for providing those benefits, and promised to pay them. Also, of course, Defendant Intelsat is saddled with the privatization statute which clearly says it can not claim any immunity, in addition, Defendant Intelsat post-privatization renewed its promise directly to the retirees. Indeed, in Gould, the Court recognized the privatized entity would be liable for its own continuing wrong. Id. at 853 F.2d 450. Herein, even after privatization, Defendant Intelsat promised to pay vested retiree benefits. Complaint at ¶¶ 37-40.

Concerning the waiver of immunity issue, it is hard to imagine clearer evidence of an intent to waive immunity, than the Board Resolution and the Transfer Agreement. The ultimate question is did pre-privatization Intelsat intend that the promises could be enforced, and that its immunity did not apply. The Board Resolution and Transfer Agreement give a clear answer – yes, explicitly providing the promises were enforceable under ERISA. Indeed, pre-privatization Intelsat presumably never even considered the need for an express waiver, other than citing to the ERISA statute, because it never envisioned that post-privatization Intelsat would even try to make an immunity argument. Post-privatization Intelsat had no immunity under its privatization statute, and pursuant to the Board Resolution and Transfer Agreement, post-privatization Intelsat agreed to accept the liability for the retirees’ benefits pursuant to ERISA. Those documents made crystal clear post-privatization Intelsat must pay for vested retiree benefits, and, of course, the privatization statute explicitly stated Defendant post-privatization Intelsat had no immunities.

Indeed, the Board Resolution was clear the agreement was subject to ERISA, which of course, could not apply if any immunity existed. Moreover, the courts have repeatedly held that

an agreement to be bound by a particular law is a waiver of immunity. Marlowe v. Argentine Navy Commission, 604 F.Supp. 703, 704 (D.D.C. 1988) (“the courts have found such waivers in cases wherein a foreign state . . . has agreed that the law of a particular country should govern a contract.”); Eckert International Inc. v. Government of Sovereign Democratic Republic of Fiji, 32 F.3d 77, 79 (4th Cir. 1994)(same). Finally, if there is any ambiguity, this becomes a factual issue, for which testimony of Board members can be taken.

As for successor liability, since the current plan is governed by ERISA, the ERISA caselaw concerning successor liability is equally applicable to it. The successor entity is governed by ERISA law, and thus it is bound by the caselaw under ERISA. Indeed, the very Board Resolution at issue says the promised vested benefits are governed by ERISA.

As for the question of whether the Board Resolution is specific enough to be a plan document, contrary to Defendants’ allegation, the Resolution is very clear as to what benefits are provided for by the Resolution. The Resolution adopts the level of benefits that existed on January 1, 2001, two months before the Resolution was passed. The level of benefits which had been provided on January 1, 2001, was, as of the March, 2001 Resolution, a historical fact, which could be proven.

Likewise, the Defendants’ claim that there is an issue as to whether the benefits are vested, is refuted by the clear wording of the Board Resolution, which used the word “vested” and clearly stated the benefits could not be terminated. The very cases Defendants rely on fault the plans in those cases for failing to use the word “vested,” a fault that does not exist herein. Moreover, at this point in time, in considering a motion to dismiss, all factual inferences are made in the Plaintiffs’ favor.

The Defendants also attempt to claim that Defendant Intelsat never adopted the Board Resolution. Again, however, Defendants attempt to ignore that nasty Transfer Agreement which they would like the Court to also ignore. The Transfer Agreement explicitly provides in section 2.03 that Defendant Intelsat is responsible for providing the retirees' vested benefits pursuant to the Board Resolution. Again, all factual inferences are to be made in the Plaintiffs' favor.

As for the other provisions of the Transfer Agreement which the Defendants rely upon (the alleged merger clause and the alleged no third party beneficiary clause), they present at most factual issues which must be considered in light of the clear provision in section 2.03, as well as the entire Transfer Agreement which is not even before the Court. The parties intent must be considered as to whether the general provisions which Defendants cite to, can overcome the specific provision in section 2.03. Of course, in contract interpretation, the specific always overcomes the general.

Lastly, as for the breach of fiduciary duty, promissory estoppel and fraud claims, the Court is bound to follow the Complaints' allegations as being true, a fact of law the Defendants ignore throughout their memorandum. The Defendants are making arguments which are only available in a motion for summary judgment, and that is not the issue herein. The Complaint clearly pleads factual misrepresentation, reliance, and the consequences of the fraud, and that is all that is required to defeat a motion to dismiss (Complaint at ¶¶ 30-31, 35-36, 39-40, 60-65). Questions of proof can only be raised after discovery is taken. Plaintiffs look forward to documenting through the Defendants' own documents their promises and their misconduct.

In summary, Defendants claim they can rely upon the immunity of pre-privatization Intelsat to avoid the explicit promises of pre-privatization Intelsat. To say the argument is to realize how absurd it is. How could pre-privatization Intelsat make a promise, commit to having

the promise enforced pursuant to ERISA, but intending the very entity it committed to fulfill the promise, Defendant Intelsat, would use pre-privatization Intelsat's immunity to escape the promise. Such a claim is illogical and nonsensical. When one looks beyond the attempted tricky and bold immoral acts of Defendant, the case is simple – the Court is bound to follow the intent behind pre-privatization Intelsat's clear promise to the retirees, as well as post-privatization Intelsat's clear agreement accepting its responsibility to live up to that promise. Moreover, post-privatization Defendant Intelsat reaffirmed its promise of vested retiree benefits in October, 2001, a legally and morally binding commitment, untainted by any immunity claim.

CONCLUSION

Defendants' motion to dismiss should be denied.

Respectfully submitted,

PLAINTIFFS

By /s/ Lawrence P. Postol
Lawrence P. Postol, DC Bar No. 239277
SEYFARTH SHAW LLP
815 Connecticut Avenue, N.W.
Suite 500
Washington, DC 20006-4004

DATED: November 30, 2004

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of November, 2004, the foregoing Surreply Memorandum in Support of Defendants' Motion to Dismiss was electronically filed and served by first class mail on:

G. Stewart Webb, Jr.
Venable LLP
575 7th Street
Washington, DC 20004

/s/ Lawrence P. Postol
Lawrence P. Postol